OGC 70-0672

OGC Has Reviewed

30 April 1970

MEMORANDUM OF LAW

SUBJECT: Proxy Marriages

1. As a result of past and current queries addressed to this office concerning proxy marriages, the following commentary treats with the current status of such marriages in the United States with specific reference to their applicability to Agency employees.

2. A proxy marriage is a marriage ceremony in which at least one of the contracting parties is absent and is represented by an agent or proxy who is present and who has authority to act and does act on behalf of his or her principal.[1] While there is some doubt, it is generally accepted that marriage by proxy became a part of the English common law brought to the American colonies.[2] This is supported by the fact that there are reports of proxy marriages having been performed in the colonies.[3]

3. The status of the proxy marriage in the United States has always been difficult at best to research. The best a leading writer on the subject could say in 1919 was "Marriages by proxy have doubtless taken place in this country, but no record thereof can be found in the decisions of the courts."[4] Subsequently, there have been a few court decisions on the subject, but a review of the various state statutory provisions dealing with the contracting of marriage is of little help. While apparently not a single state statutory provision expressly authorizes marriage by proxy, only one jurisdiction, Louisiana, has a statute expressly forbidding it.[5] Proxy marriages in the United States have been upheld under either of two legal approaches: That it constitutes

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[1] Annot., 170 A.L.R. 947 (1947).

[2] Lorenzen, Marriage by Proxy and the Conflict of Laws, 32 Harvard L. Rev. 473, at 482 (1919).

[3] Comment, 25 So. Cal. L. Rev. 181, at 182 (1951).

[4] Lorenzen, supra note 2, at 482.

[5] La. Civ. Code art. 109 (1932).

a valid common law marriage or that it meets the statutory requirements for a ceremonial marriage.[6] The fact that a jurisdiction still recognizes as valid a common law marriage contracted within its borders--currently there appear to be fourteen such states[7]--does not necessarily mean that it also accepts as valid a proxy marriage. Conversely, as will be seen further on, some states which prohibit common law marriages, accept as valid, proxy marriages contracted within their borders.

4. The most recent and comprehensive treatment of the status of proxy marriage in the United States found by the author, appeared as a law review article in 1962.[8] Moore, after what appears to be considerable individual research and correspondence with the various States' Attorney Generals, found nine states which accepted proxy marriages contracted within their borders as valid. These were Florida, Idaho, Iowa, Kansas, Montana, Nebraska, Oklahoma, Nevada and New Mexico. He also declared the validity of proxy marriage as unknown in the four states of Alabama, Georgia, South Carolina and Texas. According to Moore, only three of the nine jurisdictions in which proxy marriages could be validly performed sustained such unions as common law marriages--Florida, Kansas and Oklahoma. The remaining six jurisdictions upheld such marriages as a form of ceremonial marriage.

5. Research and experience subsequent to Moore's article suggest the need for updating his findings. Since January 1968, common law marriages are not authorized in Florida.[9] Since proxy marriages in Florida had previously been sustained as common law marriages, it would appear that Florida should be deleted from the list of nine states accepting proxy marriages as valid. To the list, however, should be added the District of Columbia. Proxy marriages have been performed in the District of Columbia, to the sure knowledge

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[6]Jacobs and Goebel, Cases and Other Materials on Domestic Relations 129 (1952).

[7]These are Alabama, Colorado, District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. Martindale-Hubbell Law Directory, Law Digest, Vol. V (1970).

[8]Moore, The Case for Marriage by Proxy, 11 Cleveland-Marshall L. Rev. 313 (1962).

[9]Martindale-Hubbell Law Directory, Law Digest, Vol. V (1970).

of the author, as recently as the fall of 1969. Texas should be transferred from Moore's "unknown validity" list to the "valid" list. At the very least, Texas appears to authorize proxy marriages where the separation is due to military service.[10] As noted above, Moore listed South Carolina on his "unknown validity" list. Our experience indicates that in 1966 the State Attorney General of South Carolina issued a ruling prohibiting the performance of proxy marriages.[11]

6. Therefore, there appear to be currently ten states which authorize the performance of proxy marriages: District of Columbia, Idaho, Iowa, Kansas, Montana, Nebraska, Nevada, New Mexico, Oklahoma and Texas.

7. Most proxy marriages in the District of Columbia appear to have been performed by one judge in particular, Judge Beard. Our experience indicates that such a marriage can be performed if the judge is satisfied there is a compelling reason. Pregnancy has been deemed sufficient reason. It is unknown what else might be deemed compelling by the judge. It is known, however, that if the sole reason for wanting such a marriage is to permit one to travel at Government expense as a dependent spouse, such is not considered a compelling reason. This requirement of a compelling reason appears to be applicable only to the District of Columbia from among the ten states authorizing proxy marriages. It is not known whether a proxy marriage in the District is sustained as a common law or ceremonial marriage. It is known, however, that the judge has in the past expressly waived the statutory prerequisites to the issuing of a marriage license.

8. Idaho, Iowa and Montana accept proxy ceremonial marriages. Idaho and Montana do so in the face of statutes requiring "the parties" to utter their consents in the presence of the person solemnizing the marriage.[12] "Parties" is apparently construed as meaning one of the contracting parties and the proxy. Iowa's marriage statute does not require the presence of both parties. All three of these jurisdictions,

[10] Ibid.

[11] As related in a telephone conversation between a South Carolina judge and a local D. C. attorney.

[12] Moore, supra note 8, at 317.

while recognizing common law marriages, are prevented from sustaining a proxy marriage as a form of common law marriage because consummation is deemed essential to the latter.[13] It is not known whether the statutory prerequisites to obtaining the license might be waived.

9. A proxy marriage in Nebraska is valid if the contracting parties belong to a religious denomination which sanctions this form of marriage.[14] New Mexico has an act similar to the Nebraska statute,[15] however, a 1943 opinion of the State Attorney General stated that the marriage statutes permit a wedding solemnized with one party represented by a proxy and did not restrict this form to members of churches which perform proxy marriages.[16]

10. A proxy marriage was declared consistent with the ceremonial marriage laws of Nevada in the 1951 case of Barrons v. United States.[17] The question in this case was whether decedent's wife by a proxy marriage was entitled to the proceeds of his National Service Life Insurance policy. Decedent's father claimed she was not legally the wife by virtue of the proxy marriage. The Government interpleaded the parties, and the United States Ninth Circuit Court of Appeals decided in favor of the wife.

11. A proxy marriage performed in Texas cannot be sustained as a statutory marriage, but it may be valid as a common law marriage. The requisite "cohabitation" is said to be shown where the parties, one of whom is absent from the United States while serving in the armed forces, go through a proxy marriage, thereafter reveal to others that they are married, and exchange letters and presents as husband and wife, and the husband supports the wife or causes the Government to pay her an allowance as his wife.[18]

[13] Supra note 8, at 318.

[14] Ibid.; and Neb. Rev. Stat. §§ 42-115 (1952).

[15] N.M. Stat. Ann. § 57-1-3 (1953).

[16] Opinions of Attorney General of New Mexico, No. 4283 (1943), and Moore, supra note 8, at 319.

[17] 191 F. 2d 92 (1951).

[18] Supra note 1, at 949; and Opinion No. O-7529, Attorney General of Texas (1946).

12. Kansas is particularly favorable to marriage by proxy, since all that is necessary to effect a common law marriage there is mutual consent and "some measure of publicity."[19] A marriage ceremony fulfills the publicity requirement. A Kansas City attorney of some repute,[20] Thomas H. Finnigan, is particularly experienced at handling the arrangements of proxy marriages in that state. As recently as 1966, to the author's sure knowledge, Mr. Finnigan was still performing his proxy marriage service. We have on file copies of the written "marriage agreement" and "power of attorney" forms used in Kansas. Forms for blood tests must be executed by the contracting parties and forwarded to Kansas thirty days before the marriage can be performed. It is not known whether these prerequisites (i.e., blood tests and waiting period) can be waived under varying circumstances.

13. Finally, Oklahoma is liberal toward informal marriage arrangements and has found it easy to treat marriage by proxy as a form of common law marriage. A few proxy marriages have been performed with proxies for both parties.[21]

14. Any discussion of the validity of proxy marriages must take into consideration the question of conflict of laws. The general rule is that a marriage which is valid where it is contracted will be deemed valid elsewhere, unless it is denied recognition by statute or it is contrary to some strong public policy of the state of residence. This general rule applies with full force in determining whether a proxy marriage will be recognized in a state other than that in which it was contracted, even though the law of the forum does not authorize such a marriage.[22]

15. Moore in his article reports that, "No state refuses to honor a proxy marriage contracted in a jurisdiction which permits

[19]Moore, supra note 8, at 317.

[20]47 Reader's Digest 75 (1945), an article concerning Mr. Finnigan in his proxy marriage role.

[21]Moore, supra note 8, at 317; and Comment, 55 Yale L. J. 746.

[22]Supra note 1, at 949.

this form of matrimony."[23] There appear to be no modern cases which have refused to recognize, on the ground that there has been an evasion of the domestic law, a marriage validly celebrated in accordance with the law of the state where the marriage took place, where the difference in the law concerned merely matters of form. The author has found no cases in which a proxy marriage was declared invalid by reason of its contravening the strong public policy of the state of residence.[24]

16. It should be noted that Congress has prescribed a federal standard under which certain marriages, although valid at the place of celebration, will not be recognized for immigration purposes. The Immigration and Nationality Act of 1952 defines "spouse," "wife," or "husband" as excluding the participants in any marriage ceremony where the parties are not physically present in the presence of each other, unless the marriage has been consummated.[25] This definition means that where the parties are not physically present at the marriage ceremony, a proxy, picture, telephone, radio, television, and similar absentee marriage will not be recognized as evoking benefits under the immigration laws, even though it may be regarded as a valid marriage at the place of performance.[26] These benefits will accrue, however, when the marriage is consummated by cohabitation between the parties after the ceremony.

17. The question arises as to whether an Agency employee who is a party to a proxy marriage has thereby affected his entitlement to increased allowances on account of such marriage and also the distribution of benefits in the event of his or her death? Prior to 1952, the Comptroller General consistently held that, "...generally, in the absence

[23]Moore, supra note 8, at 313.

[24]United States ex rel. Modianos v. Tuttle, 12 F.2d 927 (Dist. Ct. La. 1925); and Hardin v. Davis, (1945; CP) 30 Ohio Ops 524, 16 Ohio Supp. 19. In both cases the proxy marriage performed in a foreign country was held valid even though one of the parties was, at the time of the ceremony, a resident of the state in which the validity of the marriage was later challenged and the law of the forum did not authorize proxy marriages.

[25]Sec. 101(a)(35), Act of 1952, 8 U.S.C. 1101(a)(35).

[26]Gordon and Rosenfield, Immigration Law and Procedure, Vol. 1, 2.18a(5), p. 2-90.

of a statute or decision of a proper court to the effect that such marriages are recognized or authorized in a particular jurisdiction, such marriages will not be recognized by this office as establishing an officer's right to increased allowances on account of a 'lawful wife.'"[27]

18. Beginning in 1952 the Comptroller General recognized one's entitlement to increased allowances on account of a lawful wife in view of the then current disposition of Federal and State courts to recognize the validity of proxy marriages if performed in a jurisdiction where common law marriage is sanctioned.[28] Likewise, he has held that death benefits may be paid to the non-designated widow of a serviceman-resident in California--who was married by proxy in Mexico, where proxy marriages are valid, in the absence of a ruling of the California courts on the validity of proxy marriages performed in a State recognizing such marriages.[29]

19. The most recent and currently unmodified statement of the Comptroller General on the subject of proxy marriages is as follows:

> Thus, proxy marriages are recognized by this office (1) if contracted in a jurisdiction where it appears affirmatively that such marriages are authorized by statute, or have been held valid by judicial decision, and (2) if contracted in a jurisdiction where it appears affirmatively that common-law marriage is recognized and proxy marriages are neither prohibited by statute nor held invalid by judicial decision.[30]

It would appear that in the second alternative of the above statement, the Comptroller General has exacted the requirement that a common law marriage be authorized in the jurisdiction where the proxy marriage

[27] 24 Comp. Gen. 595 (Feb. 7, 1945); see 25 Comp. Gen. 369 (Nov. 2, 1945); 27 Comp. Gen. 216 (Oct. 17, 1947).

[28] 32 Comp. Gen. 144 (Sept. 26, 1952); 32 Comp. Gen. 173 (Oct. 8, 1952).

[29] 33 Comp. Gen. 305 (Jan. 26, 1954).

[30] 33 Comp. Gen. 446 (Apr. 12, 1954).

is contracted. As previously noted above, while three states--Idaho, Iowa and Montana--authorize common law marriages within their borders, they sustain proxy marriages as statutory ceremonial marriages, not common law marriages. Also, three states--Nebraska, Nevada and New Mexico--do not authorize common law marriages celebrated within their borders, but nevertheless sustain proxy marriages as statutory ceremonial marriages. While a strict interpretation of the Comptroller General's language would seem to deny his blessing on those proxy marriages not sustained as common law marriages, in the opinion of the author, such an interpretation should not be adhered to. In fact, in a decision already cited[31] which was handed down only two months prior to the statement in question, he deemed valid a proxy marriage performed in Mexico where such is valid, but not as a common law marriage and there is no discussion of the latter.

20. In summation, proxy marriages appear to be authorized currently in ten states, not by express statutory authorization, but by judicial decision in some, opinions of states' attorney generals in others, and solely by the absence of express statutory prohibitions in still others. As to the detailed procedures for obtaining a proxy marriage in any particular jurisdiction, we are currently aware of only those in the District of Columbia and Kansas. Inquiries would have to be made, we suppose, to a clerk of the prospective court to discover these procedures in the remaining jurisdictions.

21. It further appears that if such marriages are validly performed in any of the ten states so authorizing them, they would be recognized in any other state in which the parties happened to reside. The form of a proxy marriage alone would not appear to violate a resident state's strong public policy. The only exception to this general rule is statutory in nature, wherein proxy marriages are not recognized for immigration purposes unless consummated.

[31] Supra note 29.

22. Finally, an Agency employee with a proxy marriage appears to have a "lawful spouse," insofar as the Comptroller General is concerned, for purposes of increased allowances on account of the marital relationship and also the distribution of death benefits.

signed

[redacted] STATINTL
Office of General Counsel

cc: D/Personnel